180 (2)

No. 10-1119

Supreme Court, U.S.
FILED
APR 13 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS STEINBECK AND BLAKE SMYLE,

Petitioners,

v.

MCINTOSH & OTIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* GRAPHIC ARTISTS GUILD, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, SONGWRITERS GUILD OF AMERICA, FUTURE OF MUSIC COALITION, AMERICAN FEDERATION OF MUSICIANS, SOCIETY OF CHILDREN'S BOOK WRITERS AND ILLUSTRATORS, THE AUTHORS GUILD, AND THE ARTISTS RIGHTS COALITION IN SUPPORT OF PETITIONERS

ERACH F. SCREWVALA
Counsel of Record
SCREWVALA LLC
244 Fifth Avenue, Suite #E-241
New York, New York 10001
(212) 252-2501
erach@screwvalallc.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
Visual Artists	1
Musicians and Songwriters	3
Authors and Illustrators	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN IRRECONCILABLE SPLIT BETWEEN THE SECOND AND NINTH CIRCUITS ON WHAT CONSTITUTES AN "AGREEMENT TO THE CONTRARY" UNDER SECTION 304(c)(5) OF THE COPYRIGHT ACT THAT HAS INTRODUCED CONFUSION AND UNCERTAINTY INTO THE MARKETPLACE	8
A. The Conflict Between the Second and Ninth Circuits has Created Confusion and Uncertainty That Will Have a Chilling Effect on the Exercise of Termination Rights	8
B. The Second Circuit Decision Provides a Roadmap to Undermine the Exercise of Artists' Valuable Termination Rights	9

TABLE OF CONTENTS – Continued

Page

C. The Conflict Between the Second and Ninth Circuits Warrants This Court's Granting of Certiorari 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

STATUTES

Copyright Act 1, 8, 9

Copyright Act of 1976 7

17 U.S.C. §203 10

17 U.S.C. §304(c) 10

17 U.S.C. §304(c)(5) 8

26 U.S.C. §501(c)(6) 3

RULES

Sup. Ct. Rule 37.2(a) 1

INTEREST OF *AMICI CURIAE*[1]

The nine *amici curiae* represent a broad coalition of organizations that administer or protect the intellectual property interests of tens of thousands of professional creators and artists ("artists") engaged in nearly every form of artistic expression protected by the Copyright Act. The artists represented here – from the recording artists and songwriters to newspaper photographers to the book authors – create and own works of art entitled to protection under the Copyright Act, including the termination rights at issue here. These artists are currently confronted with untenable uncertainty and the threat of burdensome litigation as a result of the conflict between the Second and Ninth Circuits.

Visual Artists

Visual artists work in many different media, including photography, illustration, animation, and the graphic arts. The work of these individuals includes such iconic images as Garth Williams' Charlotte in *Charlotte's Web* and Richard Avedon's photographic portraits of Marilyn Monroe and other

---

Pursuant to Rule 37.2(a) of the Rules of this Court, counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amici curiae*'s intention to file this brief. Each party has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no party made a monetary contribution to its preparation or submission.

celebrities. Often, visual artists work as independent contractors, placing them in a vulnerable position when negotiating with more powerful entities. The following three *amici* represent the interests of tens of thousands of visual artists.

The Graphic Artists Guild ("GAG") in the course of its forty-year history has advocated for the rights of graphic artists working in such diverse fields as industrial and web design, illustration, animation, and art direction. As independent contractors, many of GAG's 1,200 members are compelled to accept terms to their economic disadvantage. For these members, the right to terminate represents the only opportunity to truly benefit from their labor. The decision below threatens that right.

For over sixty years, *amicus* American Society of Media Photographers ("ASMP"), a non-profit professional trade association, has represented the interests of over 7,500 professional photographers principally engaged in taking photographs intended primarily for publication. ASMP has advocated for the advancement and protection of the intellectual property rights of its freelance members and has worked to educate freelance photographers on better business practices, among numerous other things. Its members have included such acclaimed photographers as Ansel Adams, Richard Avedon, Philippe Halsman, Arnold Newman, Jay Maisel, Victor Skrebneski, Joyce Tenneson, Pete Turner, and Eric Meola.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism. Over the past 65 years NPPA members have produced many iconic images, some of which have won Pulitzer Prizes.

Musicians and Songwriters

The following three *amici* comprise over 75,000 individuals working in all aspects of the music industry. In addition to composing works for public performance, these artists also create music and recordings for a diverse range of uses, including motion pictures, television, and other media.

For over seventy-five years, the Songwriters Guild of America ("SGA") has advocated exclusively for the rights of songwriters. With approximately five thousand (5,000) members, including current songwriters and the estates of deceased members, the SGA is the oldest and largest organization in the world run solely by and for songwriters and their heirs. SGA assists its members in many ways, including providing model contracts, copyright renewal and termination filing services, and royalty collection and

auditing programs. SGA also advocates on behalf of its members on issues of national importance in Congress, in the courts, and through executive agencies and departments. Its members include world-renowned living songwriters and the estates of deceased songwriters including Ervin Drake ("It Was A Very Good Year"), George David Weiss ("What A Wonderful World"), Ray Charles ("What I Say"), Chuck Berry ("Johnny B. Goode"), Harold Arlen and E.Y. Harburg ("Over the Rainbow"), and Johnny Mercer ("Moon River").

The Future of Music Coalition ("FMC") was founded in 2000 as a non-membership organization by a coalition of musicians, artist advocates, technologists, and legal experts. FMC seeks to provide musicians with a voice in the issues that affect their livelihood. FMC's work is rooted in the real-world experiences and ambitions of its member musicians whose perspective is often overlooked in policy debates. FMC views the ability to terminate previously assigned copyrights as a fundamental right for the creators of intellectual property and their statutory heirs and supports petitioners' effort to seek certiorari so that this Court may clarify the law.

Amicus American Federation of Musicians of the United States and Canada ("AFM") has over 70,000 professional musician members, many of whom are songwriters and recording artists who create songs and perform on American sound recordings, and who are entitled to copyright protection, including termination rights. Founded in 1896, the AFM, among other activities, works to protect the intellectual property interests of its members.

Authors and Illustrators

The tens of thousands of writers and illustrators represented by the following three *amici* include authors across all genres, including historians, biographers, and children's book writers, and media, including magazines, newspapers, and books. These artists are frequently required to enter into below-market agreements for their work. The termination rights established by Congress provide these artists with the opportunity to realize the true commercial value of their intellectual property. Those rights are jeopardized by the Second Circuit's decision below.

Amicus The Authors Guild, Inc. (the "Guild") is the largest society of published authors in the United States, representing more than 8,500 book authors and freelance writers, more than 8,250 of whom have published books. Its members represent the broad sweep of American authorship, including literary and genre fiction, nonfiction, trade, academic, and children's book authors, textbook authors, freelance journalists and poets. Since the day it was founded in 1912, the Guild has been the leading writer's advocate for fair compensation, effective copyright protection, and freedom of expression.

A group of Los Angeles-based children's writers formed the Society of Children's Book Writers and Illustrators in 1971 and it remains the only professional organization representing the interests of individuals writing and illustrating for children and young adults in children's literature, magazines, film,

television, and other media. Its nearly 22,000 members include published and non-published authors and illustrators.

The Artists Rights Coalition ("ARC") seeks to support artists in their efforts to protect their intellectual property rights. Working primarily through the courts, the ARC assists artists in navigating the judicial system in their litigation efforts and offers grants to assist them as they strive to protect their copyrights. It also advocates on broad national issues surrounding intellectual property rights.

SUMMARY OF ARGUMENT

The membership of the nine *amici* include thousands of individual creators and artists who hold, or at one point held, termination rights in their works. In establishing the right of termination, Congress sought to provide artists and their statutory heirs with the opportunity to recapture the rights to their works after a more accurate commercial value has been established. Congress recognized that artists are generally in a poor negotiating position at the outset of their careers, and therefore created the termination right through which it sought to correct that imbalance. Absent this Court's intervention, the broad coalition of artists represented in this brief will suffer substantial and, in some cases, permanent damage.

The irreconcilable split between the Second and the Ninth Circuits has upset the balance that Congress sought to create with the creation of termination rights in two ways. First, the uncertainty surrounding what constitutes an "agreement to the contrary" creates a chilling effect that will discourage artists from exercising their termination rights. Because termination rights are available for only a brief window of time, these rights could be permanently lost. Second, the decision of the Second Circuit provides a roadmap that allows grantees to manipulate the process and extinguish the termination rights Congress conveyed in the Copyright Act of 1976. Unless this Court grants certiorari, the Second Circuit offers grantees a forum to successfully argue that modifications to existing agreements are actually new grants of rights that extinguish termination rights.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN IRRECONCILABLE SPLIT BETWEEN THE SECOND AND NINTH CIRCUITS ON WHAT CONSTITUTES AN "AGREEMENT TO THE CONTRARY" UNDER SECTION 304(c)(5) OF THE COPYRIGHT ACT THAT HAS INTRODUCED CONFUSION AND UNCERTAINTY INTO THE MARKETPLACE

A. The Conflict Between the Second and Ninth Circuits has Created Confusion and Uncertainty That Will Have a Chilling Effect on the Exercise of Termination Rights

The hopelessly fractured jurisprudence on what will constitute an "agreement to the contrary" under the Copyright Act has injected uncertainty and confusion among independent artists represented by *amici* on this brief. An agreement that would be set aside as "to the contrary" in the Ninth Circuit would operate to extinguish termination rights in the Second Circuit. As a result of this conflict, an artist's proper exercise of termination rights may depend more on the adjudicating forum than on the exercise of appropriate formalities.

The irreconcilable conflict between the Second Circuit and the Ninth Circuit will engender a race to the courthouse, with grantees seeking out the safe confines of the Second Circuit and artists looking for relief in the Ninth Circuit. Very few of the creators,

artists, and statutory heirs represented by *amici* have the financial ability to maintain litigation against the deep-pocketed entities they do business with. Facing the potential for costly litigation, these artists may instead choose to abandon their termination. As a result, the rights of hundreds, perhaps thousands, of creators could be lost each year without any meaningful judicial review.

B. The Second Circuit Decision Provides a Roadmap to Undermine the Exercise of Artists' Valuable Termination Rights

In enacting the termination provisions of the Copyright Act, Congress intended to give artists leverage in negotiating for compensation for the use of their artistic endeavors. For nearly all of the artists represented by *amici*, this represents the first time they can negotiate on an equal footing. The Second Circuit decision, however, restores the imbalance Congress sought to remedy and gives grantees the upper hand once again.

The Second Circuit decision sanctions attempts by grantees to avoid the effects of termination by contracting around those rights. Opportunistic grantees, by making a slight adjustment to existing terms could easily argue in the Second Circuit that a new grant of rights has occurred and that any prior termination rights have been extinguished.

Indeed, many artists and statutory heirs may come to realize that they have already unintentionally

and unwittingly bargained away their termination rights in the Second Circuit. Upon exercising their termination rights, they could suddenly face litigation that they are ill-equipped to maintain, particularly against the powerful entities with which they do business.

C. The Conflict Between the Second and Ninth Circuits Warrants This Court's Granting of Certiorari

Sitting at the two epicenters of the entertainment and publishing industries, the Second and Ninth Circuits are widely recognized as the leading courts in the area of copyright law. There is little benefit to be derived from waiting for further development in this aspect of the law when the two courts that will see the vast majority of cases on this issue have spoken. Moreover, granting certiorari in this case will bring much needed national unity to the interpretation of what constitutes an "agreement to the contrary" pursuant to 17 U.S.C. §§ 203, 304(c).

The substantial harm to *amici* and the creators, artists, and estates they represent vastly outweighs the small likelihood that the law would be advanced further in the remaining circuit courts. Artists' rights will be determined not by the statutory framework enacted by Congress, but by the fortuity of the forum in which they are decided. Moreover, the mere threat of litigation may force artists to abandon their termination rights altogether. Since those rights exist

for only a limited time, those rights would be lost to the artist and their heirs forever.

CONCLUSION

For the reasons set forth above and in petitioners' brief, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERACH F. SCREWVALA
Counsel of Record
Graphic Artists Guild
American Society of Media Photographers
National Press Photographers Association
Songwriters Guild of America
Future of Music Coalition
American Federation of Musicians
Society of Children's Book Writers and Illustrators
The Authors Guild
The Artist Rights Coalition

SCREWVALA LLC
244 Fifth Avenue, Suite #E-241
New York, New York 10001